U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAY 25 2007

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Laura Reddick
for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral research fellow. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for the classification sought, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and additional evidence. As will be discussed below, the test counsel offers is no more useful than the test he accuses the director of applying. Ultimately, we concur with the director that the petitioner has not demonstrated his influence in the field.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. from Tsinghua University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, proteomics, and that the proposed benefits of his work, improved biomarkers for cancer, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

On appeal, counsel provides a lengthy discussion of how this final issue should be evaluated. Counsel essentially asserts that the director used a flawed theoretical analysis. Counsel asserts that rather than attempt to weigh the proposed benefits of the petitioner's work with the benefit inherent to the alien employment certification process, the adjudicative test is whether the alien will benefit the national interest to a great extent than an available worker with the same minimum qualifications. Under counsel's analysis, however, we would still be relying on a subjective comparison: that of the

alien to others with the minimum qualifications for the job. Rather than accept bare statements that the alien's abilities exceed those of other researchers qualified for the position, however, we look for specific accomplishments that have influenced the field and that therefore justify a prediction of future benefit.

Specifically, eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner received his Master of Science degree in Biochemistry from the Chinese Academy of Science, Graduate School of Beijing, in 1995. He then worked as a senior research scientist at the Yunnan Science Academy of Tobacco in China until March 2000. In 2003, the petitioner received his Ph.D. in Analytical Chemistry from Tsinghua University, as stated above. Upon receiving this degree, the petitioner accepted a Postdoctoral Research Fellowship at the University of Michigan Medical School. A little over a year later, the petitioner began his current position as a postdoctoral research fellow at the Fred Hutchinson Cancer Research Center in Washington.

Initially, the petitioner submitted no evidence relating to his accomplishments in the field. In response to the director's request for additional evidence, the petitioner submitted reference letters from an associate research professor at the Fred Hutchinson Research Center and four independent members of the field. While letters from one's own circle of colleagues, by themselves, cannot establish an alien's influence beyond that circle, letters from mentors are useful in explaining the alien's roles on various projects and providing a first-hand assessment of the alien's skills. In this matter, the record lacks a letter from the petitioner's mentor, [redacted] or any other coauthor. The record also lacks letters from colleagues at the University of Michigan, Tsinghua University or the Yunnan Science Academy of Tobacco.

On appeal, counsel emphasizes that the petitioner submitted a number of letters from members of the field who have never worked with the petitioner. While letters from independent members of the

field are often useful, the mere submission of letters from independent sources is insufficient. We must evaluate the content of those letters. Counsel cites a non-precedent decision from this office stating that Citizenship and Immigration Services (CIS) "must defer" to such letters on issues "where it cannot pretend competence." In and of itself, this statement is not remarkable. We do not question statements by scientific experts regarding the results of research projects. Where reference letters go beyond pure science, however, and make assertions regarding the alien's influence in the field, such assertions are more persuasive when supported by other evidence of record that should be readily available where such an influence really exists. More significantly, it is our area of expertise to interpret our statute, regulations and precedent decisions. Thus, while scientific factual assertions from scientists can serve as evidence of the truth of those scientific facts, whether or not the alien's accomplishments constitute the type of influence in the field contemplated by *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 215, falls within our area of expertise.

Regardless, the decision cited by counsel is not binding authority in future matters. 8 C.F.R. § 103.3(c). A more thorough discussion of this issue is, not surprisingly, found in precedent decisions that are binding on us. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of interest and positive response within the field are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation *and who have applied his work* are far more persuasive than letters from independent references who were not previously aware of the petitioner and are merely responding to a solicitation to review the petitioner's curriculum vitae and work and provide an opinion based solely on this review.

[redacted], an associate research professor at the Fred Hutchinson Cancer Research Center, asserts that he knows of the petitioner's work because the petitioner is part of [redacted]s research team at the same institution. [redacted] does not claim to have personally worked with the petitioner or otherwise explain how he has first hand knowledge of the petitioner's roles on various projects, especially those that predate the petitioner's arrival at the Fred Hutchinson Cancer Research Center. There is no evidence that [redacted] chairs or directs the department or division in which [redacted] works. [redacted] asserts that the petitioner "led the effort to profile stage-specific proteins" for lung cancer.

explains that the petitioner discovered two such markers, previously undiscovered despite ten years of research by others. [redacted] asserts that this work resulted in a 2002 student fellowship award. As this work took place in China, [redacted] does not appear to have first hand knowledge regarding the petitioner's alleged leading role on this project. Moreover, the record contains no evidence that any clinic or hospital, either in the United States or China, has begun using this test to diagnose the various stages of lung cancer. The record even lacks letters from clinics or hospitals expressing an interest in human trials of this test.

The regulation at 8 C.F.R. § 204.5(g)(1) provides that evidence of an alien's experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s). We do not read the regulation at 8 C.F.R. § 204.5(g)(1) to permit current employers to verify past employment with other employers. Rather, the verification must come from the employer who has first hand knowledge of the employment. Thus, [redacted] confirmation of the petitioner's employment in China has little evidentiary value.

[redacted] further asserts that the petitioner has developed a new method to classify different lung cancers at the molecular level that is "simple, saves time, requires smaller sample amounts, and provides higher resolution for significantly more accurate molecular classification of different lung carcinomas." [redacted] does not provide a single example of a laboratory that has adopted this method. [redacted] then claims that the petitioner's presentation of his work on analyzing intact cell surface proteins demonstrates the impact of this work. We will not presume the influence of a given presentation from the conference where it was presented. Rather, the petitioner must demonstrate the influence of the individual presentation.

[redacted] further asserts that the petitioner "was the first to develop a quantitative analysis and evaluation method for the insulin protein in W/O/W [water-in-oil-in-water] formulation." Dr. Lampe asserts that the petitioner's "water plug effecting" approach "solved the bottleneck problem of quantitative analysis of insulin in W/O/W formulation" as it is more sensitive and has a better resolution than conventional methods. [redacted] predicts this work "could advance efforts to develop and commercialize oral medication for insulin-dependent diabetics." According to the petitioner's own article on the subject, the "novel model of water-in-oil-in-water (W/O/W) formulation had been proposed" in 1998 by an unrelated research team publishing in the *International Journal of Pharmacology*. As noted by several references, the petitioner's work on this subject was cited in a 2003 review article as reporting a "rapid, simple and precise MEKC analysis" for determination of insulin in oil formulation. Another article cites the same work by the petitioner as one of four articles reporting the importance of organic modifiers to separation systems. The record, however, contains no additional citations of the petitioner's work or letters from pharmaceutical companies pursuing oral diabetic drugs based on the petitioner's techniques. Thus, the petitioner has not established any continued interest in this work within the field.

[redacted] Director of the Protein Center at the Sloan-Kettering Cancer Center, asserts that he knows of the petitioner's research "because it is at the forefront of cancer proteomics." [redacted] also

indicates that he has reviewed the petitioner's curriculum vitae and some of his most recent works. Dr. [redacted] asserts that the petitioner's method of analyzing biotinylated cell surface proteins in liver cancer "provides a novel method of in vivo cancer imaging and significantly advances efforts to find viable biomarkers." [redacted] further asserts that the petitioner's success in profiling stage specific proteins in lung cancer "contributes in a critical way to our understanding of the mechanism of tumorigenesis, the early diagnosis of cancer and monitoring cancer treatments." The only support for these conclusions [redacted] provides, however, is that the petitioner has published his work and has been requested to review manuscripts for publication. [redacted] oes not suggest or imply that other research laboratories, including his own, have adopted the petitioner's methods or are in the process of developing new diagnostic tools based on the petitioner's work.

The remaining independent letters are very similar to the letter from [redacted] although some include additional information. [redacted] an adjunct professor at the University of New Mexico and Team Leader of the Bioscience Division of the Los Alamos National Laboratory, asserts that the petitioner helped design target phosphorothioate oligonucleotides to treat lung cancer based on his work profiling protein expression in lung cancer. [redacted] further asserts that the clinical evaluation of these targets "is already under way in China." According to his curriculum vitae, [redacted] has resided in the United States since at least 1986. He provides no explanation as to how he has first hand knowledge of the clinical studies of the petitioner's work in China.

The regulation at 8 C.F.R. § 103.2(b)(2) permits a petitioner to rely on affidavits only after showing that primary and secondary evidence is unavailable or does not exist. Affidavits should be from individuals with "direct personal knowledge of the event." Thus, while we do not question [redacted] credibility, the regulations cited above strongly suggest that affidavits from those without personal knowledge have little evidentiary value. This is not to say that letters from independent references are not extremely useful in establishing an alien's influence beyond his collaborators. That said, the most useful independent letters are from independent sources who attest to an influence in their own laboratory because they have first hand knowledge of the alien's influence.

[redacted], Scientific Director of the Vascular Biology and Angiogenesis Program at the Sidney Kimmel Cancer Center, asserts that he reviewed the petitioner's curriculum vitae and some of his articles to prepare the reference letter. He further asserts that he was previously familiar with the petitioner's research "because his work has had a direct bearing on my own research." [redacted] never explains, however, how the petitioner has impacted his own work. For example, [redacted] does not claim to have applied the petitioner's methods or to be pursuing a diagnostic tool or treatment method based on the petitioner's work. He does not claim to have cited the petitioner and the record includes no citations by [redacted]

[redacted] Director of Proteomics at the Vanderbilt University Medical Center, asserts that the petitioner's work "has been reported multiple times on the website of *Clinical Proteomics Research Map (CPRMap)*." [redacted] further asserts that only the top 10 to 25 percent of research selected for

conferences in the field are selected to be featured on this website. Other references provide similar information.

While we will consider opinions as to the significance of evidence submitted in support of a petition, the record in this matter does not include printouts from CPR's website. Thus, the petitioner has not established that his work appeared on this website or how many times it was featured. We note that Dr. [redacted] does not define "multiple." Moreover, information directly from CPR regarding their selection criteria for including abstracts on their website would significantly bolster the assertions made by Dr. [redacted]

On appeal, the petitioner submits a letter from [redacted] Scientific Director at the Virginia Prostate Center and Director of the Center for Biomedical Proteomics at Eastern Virginia Medical School. [redacted] affirms that his opinion is based on a review of the petitioner's curriculum vitae and publications. He does not imply that he was aware of the petitioner's work prior to being contacted for a reference. More significantly, he does not suggest that his own work has been impacted by the petitioner's methods. Rather, he speculates that the petitioner's method "will be widely applied in the current proteomics research and speed up the discover of biomarkers for the early detection of human diseases and therapeutic targets for treatment."

Counsel and several of the petitioner's references emphasize that the petitioner was invited to review manuscripts for the *Journal of Proteome Research* and *Tobacco Science Review*. Counsel and most of the petitioner's references use the phrase "peer reviewer (i.e., judge)." Thus, while the references have affirmed the contents of the letters with their signature, it is not clear that the language is their own. We cannot ignore that scientific journals are peer reviewed and rely on many scientists to review submitted articles. The invitation from the *Journal of Proteome Research* expressly requests other names of potential reviewers if the petitioner is too busy. Thus, peer review is routine in the field; not every peer reviewer can be presumed to have influenced the field.

Finally, the director acknowledged the petitioner's publication record but concluded that publication was routine in the field. Thus, the director concluded that without evidence of the influence of individual articles, such as through evidence of wide and frequent citation, the publication record alone was not persuasive.

On appeal, counsel cites a July 30, 1992 correspondence memorandum from Lawrence Weinig, Acting Assistant Commissioner, to the then Director of the Nebraska Service Center, [redacted] issued his correspondence memorandum in response to an inquiry from [redacted] and makes clear that he is discussing his personal inclinations. Moreover, in contrast to official policy memoranda issued to the field, correspondence memoranda issued to a single individual do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although the correspondence may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. *See*

Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).[1]

Counsel notes that in this 1992 correspondence memorandum, [redacted] asserts that scholarly articles and citations are "solid pieces of evidence." Thus, according to counsel, [redacted] implies that the publication of scholarly articles is not routine. Rather, concludes counsel, publication is the means by which postdoctoral researchers distinguish themselves for future positions.

In his letter to [redacted] raised concerns about several regulatory criteria relating to aliens of extraordinary ability pursuant to section 203(b)(1)(A) of the Act and outstanding researchers pursuant to section 203(b)(1)(B) of the Act. Specifically, [redacted] dvised that "it is almost a job requirement at many universities that professors and researchers publish papers." Separately, Mr. [redacted] questioned whether citations were published material about the cited author. In his response, [redacted] unequivocally states that "a footnoted reference to the alien's work without evaluation . . . would be of little or no value." [redacted] goes on to state that "entries (particularly a goodly number) in a field . . . would more than likely be solid pieces of evidence."

Obviously, the publication of scholarly articles in peer-reviewed journals is "solid" evidence. Clearly, publication of one's work in a peer-reviewed journal is a useful means for a researcher to disseminate his work and potentially impact the field. We concur with the director, however, that publication by itself, without some other evidence reflecting the impact of the individual articles, is insufficient.

On appeal, counsel asserts that another non-precedent case by this office is a good example of how this office applies *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 215. As noted by counsel, the alien in that case had yet to publish his work but was still deemed eligible. The case, provided by counsel, is easily distinguished from the matter before us. The alien in that case may not have published his work, but he had developed a diagnostic test for ruminants that had gained widespread use beyond his own circle of colleagues. Had the petitioner in this matter demonstrated that clinics and hospitals were now diagnosing and treating lung cancer or other cancers differently based on his work it would be a far more persuasive record than the one before us. The record, however, contains no such evidence.

Counsel further attempts to demonstrate the significance of publication alone by noting that while publication may be common among postdoctoral associates, the statutory minimum for the classification sought is only a Master's degree. Counsel is not persuasive. The issue is whether the alien will benefit the national interest to a greater extent than an available U.S. worker with the minimum qualifications for the position, not the classification. Moreover, the regulation at 8 C.F.R. § 204.5(k)(2) provides that if "a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." The petitioner seeks employment as a

[1] Although this memorandum principally addresses letters from the Office of Adjudications to the public, the memorandum specifies that letters written by any CIS employee do not constitute official CIS policy.

postdoctoral research associate. The very title implies that a doctorate is customarily required by the position.

Ultimately, we concur with the director that the two citations provided prior to appeal are minimal and do not establish the petitioner's influence on the field as a whole. On appeal, the petitioner submits evidence of additional citations. This evidence shows that no one article by the petitioner has been cited by more than three independent research groups. Thus, even considering this new evidence, the petitioner's citation record is unremarkable.

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.